KAMARUZAMAN MAT HASSAN & ANOR *a*

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
KC VOHRAH J
[CRIMINAL APPEAL NO: 42-18-95]
31 OCTOBER 1996

CRIMINAL LAW: *Penal Code - Section 34 - Common intention - Whether prosecution must prove common intention to commit offence actually committed - Whether common intention to commit an offence sufficient - Penal Code, s. 34* *c*

EVIDENCE: *Circumstantial evidence - Inferences from facts - Whether common intention could be inferred from circumstances - Penal Code, s. 34* *d*

The appellants, two policemen, had been charged and convicted in the Sessions Court on a charge of culpable homicide not amounting to murder in furtherance of a common intention, an offence under the second limb of s. 304 read with s. 34 of the Penal Code. The evidence showed that one Miskah bin Ahmad ('the deceased'), had suffered extensive external and internal injuries while *e* being held in custody at the Sentul Police Station, on suspicion of being involved in a robbery at Wangsa Melawati. The deceased had appeared healthy and was walking normally when he was taken out of the lockup for interrogation by the appellants but when he was brought out of the sound proof room, he appeared to be weak and was unable to walk unassisted. There was *f* evidence that the deceased had suffered an injury to his forehead when he was being arrested but there was no possibility of his having sustained any other injury while in the lock-up. The deceased was pronounced dead at the hospital to which he was taken about one hour after he was brought out of the interrogation room. The evidence of the pathologist was that the injuries *g* could not have been caused by a fall and that they had been inflicted some one or two hours before death.

In their defence, both appellants had denied using force on the deceased and alleged that the injuries were inflicted elsewhere. The trial judge rejected their argument and found that the circumstantial evidence conclusively pointed to *h* the two appellants having had a common intention, and that no reasonable doubt had been raised against the prosecution case. The appellants were convicted and sentenced to six years' imprisonment. The appellants appealed only against their conviction, contending: (i) that the Sessions Court judge had erred in law by misapplying the standard of proof when she called them to *i*

make their defence; and (ii) that the prosecution had failed to establish beyond reasonable doubt a common intention. between the two accused.

Held:

[1] Although there was a lack of clarity in the language of the trial Judge's judgment, it was evident that when she called both the appellants to make their defence, there was ample evidence to show that the offence had been made out. She was acutely aware of the nature of the evidence being circumstantial and the stringent requirement for the conclusiveness of such evidence showing their guilt.

[2] There was no direct evidence to show what actually took place in the interrogation room. However, in a criminal prosecution under s. 34, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the particular offence committed. What is required is that there must be a common intention to commit a crime and the crime actually committed must be in furtherance or fulfilment of the common design.

[3] From the nature of the terrible injuries inflicted on the deceased, it was not possible for just one person to have acted alone. Even if one of them did not himself inflict any injury, both appellants were in the interrogation room, and the irresistible inference was that there was a community of design to extort information from the deceased by unlawful acts of violence. The use of criminal force is a criminal offence and the evidence showed that the acts of force were such as to be within the contemplation of both the accused.

[4] In the circumstances of the case, the trial judge was correct in rejecting the defence that the injuries were inflicted elsewhere and there was nothing to show that her assessment of the defence in the totality of the case was wrong.

[Appeal dismissed.]

Cases referred to:
Ibrahim bin Masod v. PP [1993] 3 SLR 873 ***(cit)***
Mahbub Shah v. King Emperor 72 1A 148 ***(refd)***
Mimi Wong v. PP [1972] 2 MLJ 75 ***(cit)***
Namasiyiam & Ors v. PP [1987] 2 MLJ 336 ***(refd)***
Ng Beng Kiat v. PP [1995] 3 SLR 335 ***(foll)***
PP v. Neoh Bean Chye [1975] 1 MLJ 3 ***(cit)***

Legislation referred to:
Penal Code, ss. 34, 304
Penal Code [India], s. 34

Other source referred to:
Indian Penal Code, Chitaley & Bakhale, 3rd Edn., Vol. 1, p. 162

For the appellants - Karpal Singh & Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Siti Salwa bte Musa; DPP

Reported by Anne Khoo

JUDGMENT

KC Vohrah J:

This is an appeal against only the conviction of the two appellants on a charge of culpable homicide not amounting to murder in furtherance of a common intention, an offence under s. 304 (second limb) read with s. 34 of the Penal Code.

The appellants have abandoned the appeal against their sentences. The Public Prosecutor has not cross appealed against the sentences.

It is the contention of the appellants that the learned judge of the Sessions Court who convicted them erred in law by misapplying the standard of proof when she called them to make their defence on the charge. It was further argued that it was not proved that the two appellants had the common intention as is required to be shown under s. 34 of the Penal Code and that the learned judge failed to give maximum evaluation of the evidence of a witness, Constable Supan, who exonerated the appellants.

Both the appellants (hereafter the accused or, as the case may be, the 1st and 2nd accused) were charged that they, between 10.20 am to 1.40 pm on 2 January 1993, at the Sentul Police Station, Kuala Lumpur, in furtherance of a common intention, caused the death of one Miskah bin Ahmad with knowledge that such act if done was likely to cause death, an offence punishable under the second limb of s. 304 read together with s. 34 of the Penal Code (the Code).

Under s. 304 whoever commits such offence shall be punished with imprisonment for a term which may extend to ten years, or with fine or with both.

Both the accused were found guilty and convicted on the offence. They were each sentenced to six years' imprisonment from the date of the sentence i.e. from 28 July 1995.

The Prosecution Case

Miskah, an Indonesian, together with six other Indonesians were arrested by the police on 31 December 1992 on suspicion of being involved in a robbery at Wangsa Melawati. Miskah was detained at the Sentul Police lockup.

On 2 January 1993 Miskah was taken out from the lockup and brought to a sound proof room for police interrogation.

The evidence showed that when Miskah was being arrested he fell and sustained an injury on his left forehead. And the evidence showed that there was no possibility of his having sustained any other injury while in the lockup; Miskah's cell mates PW15 and PW16 testified that while Miskah was in the lockup with the other Indonesians there was no quarrel or fight amongst themselves.

The evidence of police personnel PW9 and PW17 at the police station showed that before and when Miskah was taken out of the lockup for police interrogation on 2 January 1993 he appeared to be healthy and he was walking normally.

Miskah was taken into the sound proof room at 10.20 am. He was taken out of the same room at 1.40 pm. The evidence of police personnel PW9, PW17 PW12 and Constable Supan (PW24) showed that at 1.40 pm both the accused and PW24 brought out Miskah from the interrogation room to the lockup and at that time Miskah appeared to be weak and unable to walk and that the latter three assisted him to the lockup.

PW9 and PW12 then examined Miskah in the cell and found injuries on his body.

At 2.05 pm Corporal Mat Johari (PW14) examined Miskah and found him unconscious. His pulse was very weak and he appeared to be dying. Miskah was then taken to the Kuala Lumpur Hospital and at about 2.35 pm Dr. Ashwin Kumar (PW13) examined him and found that he had already died.

Dr. Abdul Rahman (P25), an expert consultant pathologist, who did the external and internal post mortem examination of the body, found extensive external and internal injuries on Miskah and he put the cause of death as being due to the extensive internal injuries caused by blunt trauma.

It was the case of the prosecution that the common intention of the two accused was to cause Miskah bodily injury and that it was in furtherance of the common intention to cause hurt that the fatal injuries were inflicted.

Nature Of Injuries

To understand the prosecution case in relation to proof of common intention it is necessary to deal with the extensive injuries that were found on Miskah and also to ascertain the probable time they were inflicted.

There were several lacerations on the head and face of Miskah though one of the injuries, one on the left forehead, from the evidence of the officer who arrested Miskah (as was mentioned earlier) was sustained during a fall when Miskah was being arrested. There were also several abrasions and bruising of the upper limbs as well as on the lower limbs.

There were serious injuries on the back and they need to be set out to show their nature and how extensive they were.

These were an inverted, U-shaped abrasion wound on the left scapula region measuring 20 x 5cm, a linear abrasion wound on the lateral aspect of the left scapula extending from the suprascapular region downwards measuring 12 cm in length, a patterned abrasion wound just below the inferior angle of the left scapula measuring 5 x 0.5 cm, a linear abrasion wound over the left subcostal region measuring 4 x 0.5 cm, a U-shaped abrasion wound over the left lumber region extending from the midline upwards to the left subcostal region measuring 29 x 0.5 cm, an abrasion wound on the back of the right subcostal region measuring 6 x 1 cm, an abrasion wound close to the midline of the lumbar area measuring 2.5 x 1.5 cm, an abrasion wound over the left upper part of gluteal muscle measuring 9.x 1.5 cm associated with small abrasions at the medial aspect measuring 3 x 0.5 cm and three linear abrasion wounds over the lower part of the left gluteal muscle, each measuring 1.5 x 0.5 cm.

The internal injuries were far more serious and they included multiple rib fractures and a damaged liver.

There were multiple rib fractures of the 4th, 5th, 6th, 7th left ribs along the midclavicular line and bruising of the 4th, 5th, 6th, 7th, 8th, 9th and 10th left rib cage along the left costal ribs. There was minimal left haemothorax with about 200 mls of blood collection in the left pleural cavity. The trachea and air passages were patent but filled with blood-stained mucus in small areas. Both lungs were partially collapsed and moderately congested and oedematous. There was internal disruption within the lungs associated with obvious haemorrhage and seen involving the lower lobes of both lungs.

In the abdomen there was minimal haemoperitoneum and the stomach contained blood-stained fluid. There were multiple abrasions/erosions of the mucosa of the stomach. Bruising of the mesentery and distal part of the jejunum were also noted. As for the liver there were ruptured hepatic artery

and ruptured liver parenchyma internally. Contusion markings were seen on the undersurface of the liver around the main portal tract associated with multiple small lacerations. The portal tributaries were seen to be generally contused.

There was also fracture of the right pelvic bone close to the spine.

According to PW25 the cause of death was due to the internal injuries caused by blunt trauma.

PW25 was of the view that the U-shaped injuries inflicted on the back area and which caused the fracture of the ribs and the damage to the lungs were caused through pressure being applied by a U-shaped object like the metal frame of a chair or wooden or rattan object against the body.

There was an attempt to show that the U-shaped injury was caused by a chair (P14) which had a metal frame which could give a U-shaped indentation but the learned judge noted that that was not proved.

As for the damage to the liver, the consultant pathologist was of the view that it could have been caused by pressure being applied below the chest on the right or by a kick or a punch made with force from the front.

The pathologist said that the injuries on the back and the internal injuries could not have been caused by a fall and that they had been inflicted some one or two hours before his death.

Defence

In their defence both the accused denied using force on Miskah. It was clear that the defence was that the injuries were inflicted elsewhere. The first accused testified that when he saw Miskah at about 10.30 am he saw that he had an injury on his left forehead and abrasions near his heels. He said that he did interrogate Miskah and that the 2nd accused entered the interrogation room at about 12 pm and assisted him in the interrogation room. He also stated that the door to the room was not locked and that several police personnel came into the room including Inspector Mohammad Jamil (PW26) and Constable Supan (PW24) but that these people did not take part in the interrogation.

The 2nd accused testified that he went into the room at about 12 pm. He interrogated Miskah and he appeared cooperative though he spoke little. He also said that while he was there several police personnel including PW26 and PW24 were there. He said that after the interrogation was over Miskah was sent to the lockup by him, the 1st accused and PW24.

Decision Of Trial Judge

The trial judge rejected the argument that the injuries were inflicted elsewhere. She said the circumstantial evidence conclusively pointed to the two having had a common intention as stated in the charge and that no reasonable doubt had been raised against the prosecution case.

Onus Of Proof

One of the grounds of appeal was that the learned judge misapplied the standard of proof when she called upon the accused to make their defence. Admittedly there is a lack of clarity in the language of the judgment. There might be the usual incantation, albeit a little garbled, relating to the standard of proof but there is no magic in such incantation. A far more important consideration, however, is to examine the nature of the evidence and see how she treated it. When the learned judge called both the accused to make their defence there was ample evidence, and indeed she so stated in her judgment before she considered the defence, to show that the offence had been made out, as was the common intention on their part, as specified in the charge.

Viewed against the whole context of her judgment she did sift through all the evidence and she was acutely aware of the nature of the evidence being circumstantial and the stringent requirement for the conclusiveness of such evidence showing their guilt.

Common Intention

The main ground of appeal is that the prosecution had failed to establish beyond reasonable doubt a common intention between the two accused as defined in s. 34 of the Code.

Section 34 reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In *Mahbub Shah v. King Emperor* 72 1A 148 at 153 the Judicial Committee of the Privy Council had this to say on s. 34 of the Indian Penal Code (similar to our s. 34):

> To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intent of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their

> Lordships that common intention within the meaning of the section implies a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

Admittedly in this case there was no direct evidence adduced to as to what actually took place in the sound proof interrogation room and in this regard it is pertinent to note what Syed Agil Barakbah SCJ stated in the Supreme Court case of *Namasiyiam & Ors. v. PP* [1987] 2 MLJ 336 at 337 where he discussed circumstantial evidence:

> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by J.K. Soonavala p. 188 to 193).

One aspect of common intention that is often forgotten is that in a criminal prosecution where s. 34 is involved it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the particular offence committed. As is observed in Chitaley and Bakhale: *Indian Penal Code* (3 Edn.), Vol. 1, p. 162, the "criminal act" (stated in s. 34) must be done by the several persons alleged to have taken part in it, "in furtherance" of the common intention of all of them and it involves two propositions:

(a) That there must be a common intention on the part of several persons to commit a certain crime.

(b) The crime actually committed must be in furtherance or fulfilment of the common design.

In regard to the second proposition the authors observes that if the crime is one which falls outside the purview of the common design, this section will not apply and no person other than the one who has actually committed such crime will be liable for the offence or offences involved in the crime.

The illustration given by the authors is helpful to understand the second proposition. Thus, suppose A and B set out to give a beating to C and their agreed intention is to use only their fists in the fight. If an unlucky blow

causes C's death, both A & B will be liable for the death. But, if in the fight, B, without A's knowledge or consent, whips out a knife, which he has concealed on his person and stabs C with it and kills C, A will not be responsible for B's act. But it is B alone that will be responsible for it.

In the Singapore Court of Appeal case of *Ng Beng Kiat v. PP* [1995] 3 SLR 335 at 340 Yong Pung How CJ relying on *Mimi Wong v. PP* [1972] 2 MLJ 75, *PP v. Neoh Bean Chye* [1975] 1 MLJ 3 and *Ibrahim bin Masod v. PP* [1993] 3 SLR 873 explained that for s. 34 of the Penal Code to apply, a common intention among the participants to commit the actual crime was not required and need not be proved by the prosecution. As long as the act which constituted the criminal offence charged was committed in furtherance of a common intention among the participants, then all the participants would be made vicariously liable for the criminal offence. The intention to inflict the fatal injuries need not be shared by all the assailants. The court held that the common intention of the assailants in the case before the court was to cause the deceased bodily injury and it was in furtherance of the common intention to cause hurt that the injuries were inflicted which led to the death of the deceased.

Coming back to our present case, from the nature of the injuries found in Miskah PW25 concluded that the injuries had been inflicted about 1 to 2 hours before his death. This is what he said:

> Seseorang yang mengalami kecederaan dalam seperti mangsa ini dalam kes ini kecederaan dalaman ialah pada bahagian dada (thorax) dan abdomen, seseorang yang alami kecederaan seperti ini tidak akan mati dengan serta merta selepas mengalami kecederaan tersebut, tetapi mungkin beberapa jam seperti satu atau dua jam selepas mengalami kecederaan di bahagian thorax dan abdomen. Tetapi sebagaimana yang saya sebut awal tadi, si mati mengalami luka laserasi di kepala dan luka di bahagian kepala ini juga boleh menghasilkan pendarahan dan mungkin kecederaan ini mempercepatkan lagi proses kematian.

It is important to establish the earliest time these injuries could have been inflicted. Corporal Mat Johari (PW14) had stated that Miskah was still alive at 2.05 pm that day. He did state that the man was unconscious, had a very weak pulse and appeared to be dying. He assisted others to put Miskah into a van at 2.10 pm for him to be sent to the hospital. At that stage he was not certain if Miskah was still alive. Dr. Ashwin Kumar's evidence was that when he examined Miskah at 2.35 pm he was already dead and that he had probably died about 45 minutes earlier. The high probability is that Miskah had died shortly after 2.05 pm.

Going by the consultant pathologist's estimate, the earliest time the injuries could have been inflicted was 12.05 pm and the latest, just before 1.40 pm, this later time being the time when Miskah was assisted out from the interrogation room to the lockup.

The evidence of the prosecution was that the 1st accused was with Miskah in the interrogation room from 10.20 am when he brought him there till 1.40 pm. And it was the prosecution's evidence that the 2nd accused went into the interrogation room at 11 am and remained there till 1.40 pm.

The purpose of interrogating Miskah was to obtain information from him as to the commission of a robbery at Wangsa Melawati and it is clear from the nature of the injuries found on Miskah that criminal force was used on Miskah in order to extort information from him and that the injuries were most probably inflicted on him between 12.05 pm and 1.40 pm when both the accused were present in the room.

The time frame can however be narrowed further and this can be gleaned from the evidence of Constable Supan (PW24). It will be noted that the criticism has been levelled at the judge of the Sessions Court for not having given PW24's evidence the maximum evaluation as it is argued that his evidence exonerated the two accused.

PW24 was told to join in the interrogation by Inspector Mohammad Jamil (PW26). He went into the interrogation room between 12.45 and 12.50 pm and saw the 1st accused interrogating Miskah and the 2nd accused at the typewriter. At that time Miskah who had his hands handcuffed at the back was jumping up and down. While he was there, PW26 poked his head in and asked for the progress of the interrogation and told them to bring the suspect to the lockup after the interrogation. PW24 was there for 5 minutes. He went out and came back at about 1 pm and when he came back he joined in the interrogation although he did not use force nor did he see any force being used on Miskah. He said that he saw Miskah jumping up and down. The 1st accused was doing the interrogation and the 2nd accused was typing. At one stage Miskah told the 1st accused that he was dizzy and asked that he be allowed some rest. He appeared tired and his face was pale. PW24's evidence merely showed that the injuries could not have been inflicted while he was in the room with both the accused and that the injuries were most probably inflicted between 12.05 pm and 1 pm. To be noted is that the learned judge in her judgment made note of the fact that when PW24 entered the room for the second time he had observed that Miskah complained of giddiness and appeared tired.

From the nature of the terrible injuries inflicted on Miskah during the length of time when only the two accused and Miskah were in the interrogation room it is not possible for just one accused to have acted alone in inflicting the injuries. The irresistible inference is that both acted in concert to extort information from Miskah by a series of unlawful acts of violence.

The evidence of the expert consultant pathologist shows that externally there were multiple injuries on the head, the arms, the back and lower limbs and internally, there were multiple rib fractures, internal bleeding and damage to both the lungs, damage to the liver and other internal organs. The injuries were not due to a fall. What these internal injuries indicate is that deliberate acts of violence were inflicted over a period of time. And it is not possible for Miskah to have suffered the terrible injuries in silence when they were inflicted. It would be ridiculous to entertain any notion that one of the two accused merely shut his ears and closed his eyes while the other inflicted the injuries. Both the accused were in the room. Even if one of them did not himself inflict any injury on Miskah, and that is highly improbable, it is an irresistible inference that there was a community of design to extort information from Miskah and to use violence to that end and that violence was used to extort information from Miskah.

The common intention in this case was to use violence on Miskah to extort information from Miskah. The using of force is a criminal offence. And the evidence showed that acts of force, all of which constitute criminal offences, were such as were within the contemplation of both the accused.

Neither may have intended to cause the death of Miskah but one of the criminal acts of violence or several of them caused the fractures of the ribs, the collapse of the lungs and the damage to the liver which all led to his death. Though they did not intend to kill Miskah the crime of causing hurt was within the scope of their contemplation and they must have been aware of the possibility that the severe injuries would cause his death.

In all the circumstances of the case the learned judge was right to conclude, at the close of the prosecution case, that the charge had been made out beyond a reasonable doubt against both the accused.

Again in all the circumstances of the case the learned judge was correct in rejecting the defence that the injuries which caused the death were not inflicted in the interrogation room but elsewhere. I have no ground to interfere with her assessment of the withnesses credibility and nothing has been shown that her assessment of the defence in the totality of the case was wrong. I concur with her finding that their defence did not create a reasonable doubt on the prosecution case. In the circumstances the appeal against conviction is dismissed.